BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARRELL E. SHEPARD	)	
Claimant	)	
V.	)	
	)	
LAFORGE & BUDD CONSTRUCTION CO., INC.	)	Docket No. 1,060,203
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of Administrative Law Judge Thomas Klein's June 10, 2013 Award. The Board heard oral argument on September 20, 2013. William Phalen, of Pittsburg, Kansas, appeared for claimant. Vince Burnett, of Wichita, Kansas, appeared for respondent.

The Award indicated claimant sustained a 12.5% impairment to the body as a whole and a 74% permanent partial general (work) disability based on a 49% task loss and a 100% wage loss.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant had a prior neck injury and cervical spine surgery in 2000. Respondent argues claimant's prior neck injury put him in at least DRE Cervicothoracic Category II for a preexisting 5% functional impairment. Respondent asserts claimant suffered no additional impairment to his neck as a result of this accident, and should be limited to a scheduled injury to the right shoulder only. Respondent requests that the Board modify the Award to reflect a 5% impairment to the right upper extremity at the shoulder level.

Claimant argues there should be no reduction in his current impairment because no evidence proves prior impairment. Claimant asserts that Dr. Stein's opinions are less than credible, Dr. Prostic's functional impairment rating is more credible and requests the Board modify the Award to reflect Dr. Prostic's task loss of 86%.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

In 2000, a chiropractor attempted to manipulate claimant's neck and back and likely caused a herniated disc. Claimant experienced neck, right upper extremity and hand pain. He underwent a cervical discectomy at C6-C7 or C7. He missed about one month of work. Claimant testified he made a full recovery after surgery, his symptoms went away, he was pain free and he returned to work as a heavy equipment operator without restrictions or problems. He denied using medication thereafter. As a result of this incident, claimant settled for $100,000; the details of the settlement are otherwise unknown. Such settlement was not the result of a workers compensation claim.

Prior to his 2000 injury, claimant had worked for respondent as a heavy equipment operator since 1995. He performed such work until 2002, when he assumed the same sort of duties for JRB Construction, before becoming a superintendent for JRB from 2003 to 2005. Claimant began working a second time for respondent in 2005 as a heavy equipment operator and a superintendent. All of these jobs required that claimant operate equipment such as track hoes, back hoes, bulldozers, motor graders and skid loaders.

On April 29, 2011, claimant's crew was constructing a parking lot. Claimant was standing on fabric. A truck drove across the fabric, pulling it out from under claimant's feet. Claimant was thrown in the air before landing on his right shoulder and neck.

Claimant reported the accident and received authorized treatment through Drs. Willhite, Shelton, Dillon, Walker, Jackson and Galate. After treatment, claimant attempted to return to work in late-July or early-August 2011, but left work after a few days due to pain. Claimant has not returned to work. Claimant applied for social security disability and was awarded such benefits in June 2012.

Claimant testified he continues to have constant pain in his neck, chest and down his right arm, and difficulty turning his head due to neck stiffness. He wakes up about two times a night due to pain and is unable to tolerate prolonged sitting, standing or walking.

On June 4, 2012, claimant was seen at his attorney's request by Edward Prostic, M.D., a board certified orthopedic surgeon.[1] Dr. Prostic diagnosed claimant with multiple-level cervical spine stenosis, cervical radiculopathy, impingement syndrome of the right shoulder and right carpal tunnel syndrome; all of these diagnoses were either caused or permanently aggravated by claimant's April 29, 2011 accidental injury.[2]

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[1] Dr. Prostic performs nearly one dozen evaluations per month for claimant's counsel. Dr. Prostic testified that about two-thirds of his work is on behalf of claimants, while the remainder is for respondents and court-ordered independent medical evaluations (IMEs), including about 100 court-ordered IMEs in 2012.

[2] Prostic Depo. at 12-13, 31-34, 39, Ex. 2 at 3.

Dr. Prostic gave claimant an impairment rating of 20% to the body as a whole pursuant to the AMA *Guides*,[3] consisting of: 14% for cervical radiculopathy and spinal stenosis; 10% for shoulder impingement; and 5% for the carpal tunnel syndrome. Dr. Prostic testified that all such impairment was above and beyond any of claimant's preexisting impairment.[4] Dr. Prostic estimated claimant sustained a 10% impairment to the body as a whole based on the 2000 operation.[5]

Dr. Prostic rated claimant using the *Guides'* Range of Motion Model, not the preferred Injury Model or Diagnosis-Related Estimates (DRE) Model. He acknowledged the *Guides* indicate the Range of Motion Model can be used to differentiate between which DRE Category a person might qualify. Dr. Prostic noted that claimant's multiple-level cervical spine stenosis was out of the ordinary, so he opined he should deviate from the *Guides*.[6] Had he used the DRE Model, Dr. Prostic indicated claimant would qualify for DRE Cervicothoracic Category III, a 15% whole person impairment.[7]

Dr. Prostic further testified:

> Q. Now, could you have given him a higher impairment rating for his cervical spine by using the DRE method?
>
> A. Well, to strictly use the DRE, he needs to have either been operated, have a positive EMG for cervical radiculopathy, or have continuing evidence, physical evidence, of cervical radiculopathy in order to say he is DRE Cervicothoracic III. He had not been operated, he did not have an EMG positive for it, and at the time I examined him he didn't have physical evidence of it.
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> But on page 99, referring to what Mr. Rakestraw was discussing before, the Guides say that the examiner, when there is any confusion, should use the range of motion model, and the range of motion number that is closest to the DRE should determine the DRE that is appropriate. So in this case, by using the range of motion model, that would push him into the 15 category of DRE Cervicothoracic III since I determined by range of motion model that 14 was appropriate.[8]

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All additional references to the *Guides* are to the 4th ed., unless otherwise noted.

[4] Prostic Depo. at 15, 30, 35-36.

[5] *Id*. at 35.

[6] *Id*. at 24.

[7] *Id*. at 22.

[8] *Id*. at 29.

While claimant did not exhibit cervical radiculopathy at the time Dr. Prostic evaluated him, Dr. Prostic had no doubt that claimant had such diagnosis based on his treating physicians previously making such diagnosis. Dr. Prostic testified claimant's cervical radiculopathy was in remission, but will wax and wane over time.

As a result of the work injury, Dr. Prostic provided restrictions of light/medium-level employment and to avoid significant vibration or use of his head away from the neutral position. Dr. Prostic reviewed a task list prepared by Karen Terrill[9] and testified claimant was unable to perform 12 of the 14 non-duplicative tasks for an 86% task loss.

On November 12, 2012, claimant was seen at respondent's request by Paul Stein, M.D., a board certified neurosurgeon.[10] Dr. Stein concluded claimant's complaints referable to the neck, right shoulder, right extremity, and right axilla extending along the right lateral chest wall were "causally related to the work incident."[11] Dr. Stein opined that claimant's current symptomatology was a likely aggravation of his preexisting degenerative disk disease in the cervical spine, in addition to some soft tissue injury.[12]

Dr. Stein noted claimant improved following his prior cervical spine surgery and had no neck or upper extremity symptoms in the "year or more prior to the current incident."[13] Dr. Stein was unaware of claimant having been given restrictions or impairment due to the 2000 cervical spine surgery. Dr. Stein never reviewed any records concerning claimant's prior surgery or treatment thereafter; such records were apparently unavailable. Dr. Stein noted that claimant's lack of documented complaints following the cervical spine surgery and lack of medical treatment confirmed that he was able to work as a heavy equipment operator without problems until the 2011 work injury.[14] He also noted that the lack of medical records showing ongoing complaints would either show that claimant had no complaints or his symptomatology was tolerable. In either case, Dr. Stein acknowledged that the lack of records documenting an ongoing problem was consistent with claimant's representation of no neck or upper extremity problems until his work injury. Dr. Stein acknowledged that he had no indication that claimant was inconsistent or untruthful about his medical condition prior to his work injury.

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[9] Claimant was interviewed by Ms. Terrill, a rehabilitation consultant, on September 5, 2012.

[10] About one-third of Dr. Stein's IMEs are court-ordered. The remainder is about 60-65% from respondents and about 35-40% from claimants.

[11] Stein Depo., Ex. 2 at 6.

[12] *Id*. at 47, 67; see also Ex. 2 at 6.

[13] *Id*., Ex. 2 at 1.

[14] *Id*. at 23.

Using the *Guides*, Dr. Stein gave claimant a 5% right upper extremity impairment at the level of the shoulder, which converts to a 3% whole person impairment. In his report, Dr. Stein stated he could not determine claimant's preexisting neck and upper back impairment and that the "current injury" resulted in a 5% whole body impairment using DRE Cervicothoracic Category II.[15] Overall, Dr. Stein's rating for the 2011 injury was 8% to the body as a whole.

Dr. Stein testified that the *Guides* require the physician to rate using the DRE Model, but if there is doubt as to which category applies, the Range of Motion Model may be used as a differentiator. The patient would then be placed in the DRE Category closest to the results of using the Range of Motion Model.

Dr. Stein could not assume claimant's prior injury resulted in cervical radiculopathy.[16] He did not know which level of claimant's cervical spine was operated on in 2000 or what levels of claimant's cervical spine showed degenerative changes in 2000. Dr. Stein acknowledged that claimant's prior cervical injury "almost certainly" involved only one level, whereas his current injury involves five different levels.[17]

Regarding claimant's preexisting impairment to the cervical spine, Dr. Stein testified:

> Q. [Prior to April 29, 2011], did he have some degree of functional impairment pre-existing?
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> A. Yes, that would be automatic with the surgery.
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> Q. What would be the percentage of that impairment that was pre-existing then?
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> A. That is the problem I have because I don't know what his neurological status was. I don't know – I don't actually have the documentation. It would have to be at least 5 percent under any circumstances, but how much above that it would be, I don't know.
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> Q. So when you assigned [claimant's] current impairment of 5 percent, are you saying that he has 5 percent that was pre-existing and no new impairment to his cervical spine or are you saying that you think the overall impairment is 10 with 5 percent pre-existing and 5 percent currently?

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[15] *Id*., Ex. 2 at 6.

[16] *Id*. at 11, 60.

[17] *Id*. at 32-35, see also pp. 63-64.

A. Well, actually, I am sorry for the confusion. I could have cleared it up if I had the previous information. But basically, the situation is that when you have an injury to the cervical spine, according to the AMA Guides Fourth Edition, and you get another injury, you don't get any impairment for the other injury unless that impairment moves you to a higher category. So if I had the information to document the previous injury, then there would be no impairment for the current injury because he wouldn't have moved up to a higher level. But before I do that officially, I would like to see some records.

Q. Those records apparently were too remote and they are not available. But if we said that he at least had a 5 percent because of the pre-existing surgery and make that assumption, what would your opinion be as to whether or not the impairment for his cervical spine currently is higher than his pre-existing impairment?

A. If I am allowed to make that assumption, and I think it is a reasonable assumption, there is no impairment from the current injury.[18]

Dr. Stein further testified:

Q. You don't note any pre-existing impairment in your report that you sent to Mr. Burnett, correct?

A. What I said was I could not determine what the pre-existing impairment may have been from the surgery of 2000.

Q. Are you standing by that answer today?

A. I am.

Q. So can I take it that your opinions still remain, that [claimant] sustained a 5 percent impairment to the body as a whole utilizing DRE category II, AMA Guidelines Fourth Edition?

A. Without the pre-existing impairment, that is correct.

Q. You don't have an opinion as to pre-existing impairment, you just stated that; true?

A. I can't document that, no.[19]

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[18] *Id*. at 8-10; see also pp. 11-13.

[19] *Id*. at 46-47.

Dr. Stein acknowledged that the DRE Categories in the *Guides* do not specifically indicate that cervical spine surgery warrants a 5% impairment, but the Range of Motion Model, under table 75, assigns a 7% whole body rating for a single level decompression and no residual signs and symptoms, in addition to whatever range of motion impairment may be present.[20] Regarding this confusion, he further testified:

> A. Perhaps I led to a lot of misunderstanding by the way I worded my report. Basically what I was saying is that if there had been no previous problem with the cervical spine, no previous surgery, he would have a 5 percent impairment under category II based on today's status, in my opinion, from my exam. There is obviously a pre-existing impairment, but I don't know what it was, and I don't know how much it was. I can only tell you based on table 75 what the minimum might have been, but I can't say anything else. I probably should have elaborated on that in my report, and I apologize.
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> Q. The minimum impairment of 7 percent exceeds [claimant's] current assessment of impairment that you evaluated based on your IME, correct?
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> . . .
>
> A. Correct.
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> . . .
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> Q. One follow-up question. Based upon the prior surgery, he would have 7 percent impairment pre-existing, then you would have to add to that, because you are looking at the range of motion model, what his range of motion reduction was because of the prior injury and resulting surgery; true?
>
> A. Right. I want to emphasize once again in my report I did not state what the pre-existing impairment was because I don't have enough clinical information, and that is why the range of motion model was not used. Once you ask me what would the base be, then I can say that would be the base, but I don't know what the actual pre-existing impairment was.[21]

Dr. Stein noted claimant's cervical spine range of motion was moderately restricted, but he did not record any measurements. He did not know if claimant had preexisting cervical spine range of motion deficits. Dr. Stein testified that the Range of Motion Model gives a 4% whole body rating for the cervical spine based on "unoperated on, stable, with medically documented injury, pain and rigidity associated with none to minimal

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[20] *Id*. at 35; see also pp. 59, 65 and Ex. 6.

[21] *Id*. at 62-63, 70

degenerative changes on structure tests."[22] He further agreed that the Range of Motion Model allows for an additional 1% per level of involvement, which would result in an additional 4% or 5% for claimant's five levels of involvement, depending on how the *Guides* are interpreted.[23]

Dr. Stein indicated claimant could perform within the heavy physical demand category, but should be restricted to a 40-45 hour work week. Dr. Stein reviewed the task list prepared by Steve Benjamin[24] and testified that claimant was unable to perform 2 of 18 non-duplicative tasks for an 11.1% task loss.

On June 10, 2013, claimant was awarded permanent partial disability benefits based on a 12.5% impairment to the body as a whole and a 74% permanent partial general (work) disability. Respondent's appeal followed.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the Fourth Edition of the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[25] The Kansas Court of Appeals, in an unpublished opinion, provided guidance by stating:

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[22] *Id*. at 44; see also Ex. 6.

[23] Stein Depo. at 45.

[24] Claimant was interviewed by Mr. Benjamin, a rehabilitation consultant, on December 10, 2012.

[25] See K.S.A. 44-510e(a).

> For an award to be reduced by an amount of preexisting functional impairment, the current injury must constitute an aggravation of the preexisting condition. *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 379, 102 P.3d 1169 (2004). Once it is established that the current injury is an aggravation of the preexisting injury, the respondent has the burden of proving the amount of preexisting impairment to be deducted. *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001). This determination must be based upon the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1995). K.S.A. 44-510d(a)(23); *Criswell v. U.S.D. 497*, No. 104,517, 2011 WL 5526549, at 6-7, (Kan. App. Nov. 10, 2011), *rev. denied* (2013), (unpublished opinion).[26]

When assessing preexisting impairment, the Board has considered prior impairment ratings, settlements, preexisting conditions that could have been rated, prior contemporaneous medical records concerning a preexisting condition, claimant's pain level before the recent injury, additional treatment and the nature of claimant's physical activities prior to the recent injury.[27] It is not necessary that a condition was actually previously rated or that prior restrictions were assigned.[28]

When a worker with a preexisting condition sustains a subsequent work-related injury that aggravates, accelerates, or intensifies his or her condition, resulting in disability, he or she is entitled to be fully compensated for the resulting disability.[29] The test is not whether the injury causes the condition, but whether the injury aggravates or accelerates the condition.[30]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[31]

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[26] *Kirker v. Bob Bergkamp Construction Co., Inc.*, No. 107,058, 2012 WL 4937471 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

[27] See generally *Gibson v. Beachner Construction Co., Inc.*, No. 1,040,920, 2010 WL 1445612 (Kan. WCAB Mar. 11, 2010) and *Lyden v. Harrah's Prairie Band Casino*, No. 1,006,198, 2004 WL 2093576 (Kan. WCAB Aug. 30, 2004).

[28] See *May v. Connie May Floor Covering*, No. 1,020,794, 2007 WL 3348527 (Kan. WCAB Oct. 16, 2007).

[29] *Baxter v. L.T. Walls Constr. Co.*, 241 Kan. 588, 591, 738 P.2d 445 (1987).

[30] *Claphan v. Great Bend Manor*, 5 Kan.App.2d 47, 49, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980).

[31] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510d(a) states:

> Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . .
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> (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Baxter v. L. T. Walls Constr. Co.*,[32] the Kansas Supreme Court noted:

> Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury. One hundred percent permanent partial disability is not an unalterable condition and a worker may be rehabilitated and then return to work. A worker who has once been adjudged 100 percent permanently partially disabled and has received or is receiving benefits, but thereafter returns to work and is again injured while working, is not precluded from receiving benefits for the loss of wages resulting from the subsequent injury's aggravation of his disability. A disabled worker may receive disability benefits more than once, but the worker may not pyramid benefits and receive in excess of the maximum weekly benefits provided by statute.[33]

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[34]

ANALYSIS

There is insufficient evidence that claimant had ongoing and preexisting impairment between the time of his 2000 neck surgery and his April 29, 2011 work-related accident.

Claimant testified being symptom-free following his neck surgery and prior to his work-related accident. The record contains no documentation that claimant was receiving ongoing treatment or medication for his neck immediately prior to his work-related accident. Claimant was able to perform heavy and physical work between 2000 and April 29, 2011. These factors lean toward the absence of a loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *Guides*. Quite simply, the record does not establish that claimant was symptomatic or physiologically impaired for many years prior to the April 29, 2011 accidental injury.

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[32] 241 Kan. 588, 738 P.2d 445, 449 (1987).

[33] *Id.* at 593; see also *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 & 83,349, 4 P.3d 1188 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

[34] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976).

After the April 29, 2011 accidental injury, claimant had immediate neck and right arm pain. Claimant professed, without any contrary evidence, that he developed neck pain and range of motion limitations that were not present before. Claimant had an MRI, an EMG and medical treatment with numerous physicians, including epidural steroid injections and physical therapy. There is no indication that claimant had any symptoms necessitating such treatment until after the 2011 accidental injury. Claimant denied taking medication before his injury, but required Tramadol thereafter. Similarly, claimant was given work restrictions after the work injury, whereas there was no evidence of prior restrictions.[35]

Under *Anderson*, claimant's unrebuked testimony is viewed as conclusive, absent being unreasonable, improbable or untrustworthy. Dr. Stein voiced no reason to contest claimant's testimony that he recovered from this 2000 surgery.

This case has similarities to *Lyons*,[36] in which an employee had a 1990 work injury requiring C5-6 surgery, resulting in a 34% impairment rating and a settlement exceeding $35,000. He returned to hard manual labor without restrictions. He subsequently injured his neck again in 1999, requiring surgery at a different level, C4-5. The Board concluded that a K.S.A. 44-501(c) reduction was inappropriate because claimant's prior C5-6 injury was not aggravated by the subsequent injury at C4-5.[37] The Kansas Court of Appeals affirmed, noting a dispute in the evidence as to whether Lyons' newer injury aggravated his old injury and the fact that Lyons performed hard manual labor for nearly a decade before his new injury.[38]

In this matter, the evidence suggests that the 2000 surgery likely involved the C7 level. According to both testifying physicians, claimant's current injury involved aggravation of all five levels of the cervical spine. As in *Lyons*, claimant's injury involves more than an aggravation of a preexisting condition.

Dr. Stein's opinion that a prior cervical spine surgery automatically warrants at least a 5% impairment, or at least a 7% impairment, to the body as a whole is in contravention of the *Baxter* holding that a prior permanent impairment is not an unalterable condition.[39] Dr. Stein's opinion also only looks at a single snapshot – the fact that claimant had neck surgery in 2000 – yet ignores claimant's uncontradicted and subsequent rehabilitation, if not his complete recovery, in more than the subsequent decade.

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[35] While the parties dispute claimant's post-injury ability to work, *Bergstrom v. Spears Manufacturing. Co.*, 289 Kan. 605, 214 P.3d 676 (2009), holds that the reason for claimant's wage loss is irrelevant.

[36] *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

[37] *Lyons v. IBP, Inc.*, No. 251,250, 2004 WL 769238 (Kan. WCAB Mar. 31, 2004).

[38] The Court did review possible application of K.S.A. 44-510a.

[39] Admittedly, the notion that a permanent condition is not always permanent seems counterintuitive.

Dr. Stein, while expressing that claimant's minimum preexisting impairment would have been either 5% or 7% to the body as a whole, was somewhat equivocal. He frequently indicated that he was unsure as to the claimant's prior impairment because he did not have all the available, previous and clinical documentation or information and he did not know claimant's prior neurological status. Further, Dr. Stein acknowledged that he was sticking to his written opinion that he could not determine claimant's preexisting impairment and he had no opinion regarding claimant's preexisting impairment.

Both testifying doctors indicated that the prior surgery warranted impairment. However, neither physician testified that claimant's preexisting impairment would necessarily have been present just prior to the April 29, 2011 accidental injury.

Respondent did not prove that claimant had preexisting impairment that triggers application of the K.S.A. 44-501(c) reduction. Even if the Board were to conclude that claimant had preexisting impairment, we would still conclude claimant had a new whole body impairment. According to Dr. Prostic, claimant had a new 14% whole body rating for his cervical spine, above and beyond a 10% whole body rating that would have existed at the time of his 2000 surgery. Insofar as Dr. Stein acknowledged that the DRE Categories do not specifically warrant a 5% whole body rating for prior surgery, and his apparent reliance on the Range of Motion Model to establish a preexisting 7% whole body rating, it makes sense to try to assess claimant's current impairment based on the same methodology or an "apples to apples" approach. Cobbling together bits and parts of Dr. Stein's analysis of the Range of Motion Model, it appears claimant would have a base 4% whole body rating for an unoperated, yet stable injury, with an additional 4% or 5% impairment based on additional levels being affected. This would result in an 8% or 9% overall whole body rating, which would exceed a prior 7% whole body impairment. This methodology is somewhat faulty because range of motion figures are not accounted for in assessing claimant's prior or current conditions. However, the Board merely discusses the issue to illustrate the reality that claimant's condition demonstrably worsened.

The Board affirms the Award's finding that claimant has a split of Dr. Stein's original 8% whole body rating, as listed in his report, and Dr. Prostic's 17% whole body rating when not including any impairment for carpal tunnel syndrome, or a 12.5% impairment to the body as a whole. Similarly, the Board affirms the split of claimant's task loss as being 49%. However, to clear up what appears to be a miscalculation, claimant's work disability would be 74.5% based on a split of 100% wage loss and 49% task loss.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the June 10, 2013 Award, but notes the proper work disability calculation is 74.5%, not 74%.

AWARD

WHEREFORE, the Board affirms the June 10, 2013 Award and rectifies the benefits calculation error to reflect a 74.5% work disability.

As of October 1, 2013, there would be due and owing to the claimant 39.14 weeks of temporary total disability compensation at the rate of $545 per week in the sum of $21,331.30 plus 87.43 weeks of permanent partial disability compensation at the rate of $545 per week in the sum of $47,649.35 for a total due and owing of $68,980.65, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $31,019.35 shall be paid at the rate of $545 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of October, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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